Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# in the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-530

ROBERT BROWN,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York, Ninth and Tenth Judicial Districts**

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MIAMI REVIEW — 371-4853 — 377-3721

## INDEX TO PETITION FOR WRIT OF CERTIORARI


| | Page |
|---|---|
| CITATION TO OPINION BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| HOW THE FEDERAL QUESTIONS WERE PRESENTED | 3 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 4 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 5 |
| CONCLUSION | 12 |
| CERTIFICATE OF SERVICE | 13 |

## INDEX TO APPENDIX


| | Page |
|---|---|
| Conditions of Probation, District Court in and for Suffolk County, Case No: 2385 | App. 1 |
| Order Affirming Judgment of Conviction, Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts, April 25, 1975 | App. 2 |
| Certificate denying leave, State of New York Court of Appeals, July 7, 1975 | App. 3 |
| First Amendment to the Constitution of the United States | App. 4 |
| Fourteenth Amendment to the Constitution of the United States | App. 4 |




## TABLE OF CITATIONS


| Case | Page |
|---|---|
| *Hamling v. United States*, ____U.S.____, 94 S.Ct. 2887 (1974) | 10 |
| *Jenkins v. Georgia*, ____U.S.____, 94 S.Ct. 2750 (1974) | 10 |
| *In Re: Mannino*, 14 Cal. App.3d 953, 92 Cal. Rptr. 880, (1971) | 7 |
| *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) | 11 |
| *Miller v. California*, ____U.S.____, 93 S.Ct. 2607 (1973) | 6, 9 |
| *Roth v. United States*, 354 U.S. 476 (1957) | 6, 11 |
| *Spiser v. Randall*, 357 U.S. 513 (1958) | 7 |
| *Stanley v. Georgia*, 395 U.S. 557, 565 (1969) | 7 |

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ROBERT BROWN,

*Petitioner,*

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PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

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**On Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York, Ninth and Tenth Judicial Districts**

---

The Petitioner, ROBERT BROWN, prays that this Court will issue its Writ of Certiorari to the State of New York Court of Appeals and/or The Supreme Court of the State of New York, Ninth and Tenth Judicial Districts. The decision sought to be reviewed in the State of New York Court of Appeals, which was refused July 7, 1975,

(App. 3) was the Order of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts affirming the judgment of conviction of Petitioner, Robert Brown. Said Order being entered on April 25, 1975. (App. 2).

## CITATION TO OPINION BELOW

The opinions and decisions of the State Courts in this cause have not been reported. However, the Appendix to this Petition contains said opinions and decisions in their entirety.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because Petitioner has been deprived of his First, as well as Fourteenth Amendment rights, through the decisions and judgments of the State of New York Court of Appeals, The Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts, and the New York District Court in and for Suffolk County.

The decision on which review is sought was rendered by the highest Court of the State. All appellate remedies of the state courts have been exhausted as to the questions presented herein.

## QUESTIONS PRESENTED

1. Whether a defendant who was found guilty of promoting obscene material and put on probation can have an additional condition of probation assessed against him



which requires him to avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials either directly or indirectly when such provision is clearly unreasonable, unrelated to the offense charged and violative of his First and Fourteenth Amendment freedoms.

2. Whether a defendant has been denied Fourteenth Amendment due process where the trial judge instructed the jury that the community standard to be applied in determining the obscenity vel non of the materials in a prosecution for promotion of obscene material commenced in 1969, but tried in 1973, are those of 1969, especially where no evidence is adduced as to these standards and where the Court further instructed that the existence of certain acts render any material obscene.

## HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions were raised in these proceedings during the course of the trial, on Motion for New Trial, as well as by appropriate appellate brief.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix hereto:

First Amendment to the United States Constitution (A.4).

Fourteenth Amendment to the United States Constitution (A.4).

## STATEMENT OF THE CASE

This was a criminal proceeding commenced in 1969 against the Petitioner, Robert Brown, for a violation of Section 235.05 (1) Penal Law, State of New York. The nature of the charge was an alleged violation of the law concerning promotion of obscene material. The Defendant subsequently went to trial in March, 1973, at which time the Roth-Memoirs Test was employed.

The jury was instructed to apply 1969 standards in their deliberations even though the prosecution never elicited what said standards were. The trial judge also further instructed that if the materials involved depicted certain acts, they were automatically obscene.

The Defendant was convicted and, on a finding of guilt, sentenced to three years probation with the additional condition of probation that he:

> avoid and refrain from production, presentation, promotion, sale, or any other involvement with sexually explicit materials either directly or indirectly.

The actions of the Trial Court were affirmed by The Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts and Leave to Proceed Further to the State of New York Court of Appeals was subsequently denied.



## REASONS FOR GRANTING WRIT

### I.

One of the conditions of probation which the Petitioner, Robert Brown, was required to comply with was to:

> Avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly.

This condition is not only unreasonable, and unrelated to the offense charged; but it is violative of Petitioner's First and Fourteenth Amendment rights.

The entire condition set forth supra is pregnant with confusion and constitutional infirmity. Neither the Petitioner nor any probation officer can deduce what acts fall within the phrase "any other involvement", or "promotion" mean. Furthermore, Petitioner is precluded from "indirectly" being involved with "sexually explicit materials". What is to be considered sexually explicit, and does the term "indirectly", for example, preclude Petitioner from entering a store which sells a marriage manual? It is exhausting to attempt to determine what falls within the condition required by the Court below. (C.f. *Miller v. California*, — US 93 S.Ct. 2607 (1973) where the United States Supreme Court required said conduct to be "specifically defined".)

Furthermore, the condition is unreasonable in that Petitioner was found guilty of promoting *obscene* material; however, he is precluded from any and all involvement with sexually explicit materials. Materials which contain

sexually explicit matter need not be obscene and the *a fortiorari* reasoning of the Lower Court can not be tolerated under the First and Fourteenth Amendments especially in light of *Miller v. California*, ____U.S.____, 93 S.Ct. 2607 (1973).

The condition's unreasonableness is further evident when it is possible that Petitioner's owning of a "sexually explicit" magazine, which he keeps in his own home may be in violation of the terms of his probation.

More important, however, and directly related to the unreasonable, arbitrary, and indefinite nature of the aforementioned condition, is the fact that said condition violated and precludes the Petitioner from exercising his First Amendment freedoms. It must be noted that said condition precluded Petitioner from even personal involvement with sexually explicit material and not necessarily obscene material. There has never been, nor can there be found, a lack of constitutional protection for sexually oriented material. From *Roth v. United States*, 354 U.S. 476, (1957), to *Miller v. California*, supra, this Court has recognized that sex and obscenity are not synonymous terms. The mere fact sexual materials are involved does not mean First Amendment freedoms vanish. It is when those materials are obscene that this cloak of protection is removed. It must be limited:

> . . . to works which taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which taken as a whole, do not have serious, literary, artistic, political, or scientific value. *Miller*, supra, 2615.



This is very important instanter as Petitioner, as brought out in trial, is primarily involved in medical textbooks and other similar books, which would clearly not be obscene. Even the Court in *Miller*, supra, recognized:

> . . . Medical books for the education of physicians and related personnel necessarily use graphic illustrations in description of human anatomy. Thus, clearly not all materials can be prohibited.

Moreover, the condition made a part of the Petitioner's probation would preclude him from having, using, or producing such materials in his own home or for his own use. Even obscene material is given this protection when found in the home. As held in *Stanley v. Georgia*, 394 U.S. 557, 565, (1969):

> Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means the State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

See *In Re: Mannino*, 14 Cal. App.3d 953, 92 Cal. Rptr. 880, (1971).

"The line between speech unconditionally guaranteed and speech which may be regulated, suppressed, or punished, is finely drawn." *Spiser v. Randall*, 357 U.S. 513

(1958). The separation of legitimate from illegitimate speech requires sensitive tools. Those tools were not utilized sub judice, and this cause should be remanded so that the Lower Court may modify or strike the condition of probation entered herein.

## II.

THE JURY IN ITS DELIBERATIONS AGAINST THE PETITIONER WERE INSTRUCTED PURSUANT TO THE ROTH MEMOIRS TEST AND WERE FURTHER INSTRUCTED TO APPLY THOSE STANDARDS OF MARCH AND APRIL, 1969.

That charge was made pursuant to Section 235.00, Penal Law, where obscene is defined as:

> Any material or performance is obscene if (a) considered as a whole, its predominant appeal is to prurient shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value.

Petitioner contends that pursuant to this test the jury must apply the standards that existed at the time of trial. The language of said statute speaks in terms of the present with no reference to the past. In fact, the term "contemporary" as used by the court means ". . . happening, existing, living, or coming into being during the



same time." Webster, Third New International Dictionary, 1971. The Court therefore clearly set forth an incorrect standard.

Furthermore, there was never any indication that the jury was in fact familiar with what the "community" standard was in 1969 or whether in fact they even resided in the "community" in 1969, or of age to be familiar with said standard. Nor, did the State adduce any testimony at the time of trial as to what the standards were in 1969 so that a jury in 1973 could even apply a 1969 set of standards.

This Court has recently held in regards to obscenity prosecution that:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. *Miller* supra.

These protective features did not exist in the trial below. Just as a jury in California could not know or be familiar with the standards in Arkansas and thus declare a book to be obscene based on Arkansas standards, neither can a local jury in 1973 declare material to be obscene based on a 1969 standard, where there was neither a showing that said jurors were familiar with a 1969 standard nor any evidence presented as to such a standard. Moreover, Petitioner in an obscenity prosecution is clearly en-

titled to a benefit, if any, in the charge of the law and standards while his case is pending. *Jenkins v. Georgia*, ____U.S.____, 94 S.Ct. 2750 (1974); *Hamling v. United States*, ____U.S.____, 94 S.Ct. 2887 (1974).

The Trial Court further instructed:

> In addition, there must be a finding that the matter depicted is declared to be obscene by the courts of the state. Representations and descriptions of the following are some examples of conduct declared obscene under state law when shown in the context of being utterly without redeeming social value.
>
> a) Rigid male genitals.
>
> b) Heterosexual copulation, masturbation, male homosexuals, sodomy, heterosexual sodomy, self-sodomy, and simulated defecation.
>
> c) Heterosexual acts depicting incest between father and daughter, also mother and son. Direct male genitalia, masturbation, foreplay, oral sodomy, etc.
>
> d) Personal advertisements in a magazine soliciting sodomy.
>
> e) Heterosexual intercourse.
>
> f) Scenes depicting close contact between nude males and females indicating sexual activity. (Pages 31-32)



The Lower Court thus instructed that these depictions are obscene if they are found in a context which is utterly without redeeming social value. This was clearly error as the Court led the jury to believe that when this "conduct" exists, and there is no social redeeming value, the additional tests of considering the material as a whole, whether its predominant appeal is to a prurient interest in sex and whether the material is substantially beyond the customary limits of candor, is ignored. This instruction flies in the face of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Sex and obscenity are not synonymous and any obscene material is free from constitutional protection.

Based upon these improper, prejudicial and irregular jury instructions, Petitioner was entitled to a reversal, consistent with First Amendment and Fourteenth Amendments to the United States Constitution. Due Process requires that a defendant's conviction be based on proper jury instruction:

## CONCLUSION

Petitioner, Robert Brown, respectfully requests this Honorable Court to grant a Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts.

Respectfully submitted,

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By: /s/ Yale T. Freeman
YALE T. FREEMAN



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Honorable Henry F. O'Brien, District Attorney of Suffolk County, Griffing Avenue, Riverhead, New York 11901; and I also certify a true and correct copy of the above and foregoing was mailed to the Honorable Lawrence H. Cook, Associate Judge, State of New York Court of Appeals.

By: /s/ Yale T. Freeman
YALE T. FREEMAN

# APPENDIX

Probation Case No. _____

AT A TERM OF THE DISTRICT COURT

Held in and for Suffolk County, at the Court House, in Hauppauge, Suffolk County, New York, Present, Hon LAWRENCE NEWMARK, District Court Judge

Docket No. 2385/69 Charge 235.05(1)

THE PEOPLE OF THE STATE OF NEW YORK

—Against—

ROBERT BROWN,

Defendant

I hereby acknowledge receipt of my terms of probation

ROBERT BROWN

Defendant

Date: 3/8/74

CONDITIONS OF PROBATION

While on Probation for a period of three years you will observe the following conditions of Probation and any others which, the Court may impose at a later date and you will also follow the instructions of the Probation Officer as to the way in which these conditions are to be carried out:

MANDATED CONDITIONS:

(a) Report to a Probation Officer as directed by the Court or the Probation Officer and permit the Probation Officer to visit you at your place of abode or elsewhere.

(b) Remain within the jurisdiction of the Court unless granted permission to leave by the Court or Probation Officer.

(c) Answer all reasonable inquiries by the Probation Officer and promptly notify the Probation Officer of any change in address or employment.

OTHER CONDITIONS:

(a) Avoid injurious or vicious habits.

(b) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.

(c) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip you for suitable employment.

(d) Undergo available medical or psychiatric diagnosis and treatment and remain in a specified institution when required for that purpose.

(e) Support your dependents and meet other family responsibilities.

(g) If a minor, (I) reside with your parents or in a suitable foster home or hostel as referred to in Section 6-f of the Correction Law, (II) attend school, (III) spend such part of the period of the sentence as the Court may direct,



but not exceeding two years, in the facility made available by the Division for Youth pursuant to subdivision two of section five hundred two of the Executive Law, provided that admission to such facility may be made only with the prior consent of the Division for Youth, (IV) attend a non-residential program for such hours and pursuant to a schedule prescribed by the Court as suitable for a program of rehabilitation of youth, (V) and contribute to your own support in any home foster home or hostel.

(h) Post a bond or other security for the performance of any or all conditions imposed.

(i) Satisfy any other conditions reasonably related to your rehabilitation.

The following special conditions to the sentence of Probation are imposed:

that you avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly.

ADDITIONAL CONDITIONS OF PROBATION:

Failure to comply completely with these conditions is to be deemed a violation of this probation.

Dated this 8th day of March, 1974.

A copy of the above conditions was handed to the defendant by the Court.

Signature illegible

District Court Judge

80-1975
February Term 1975

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 25th day of April, 1975.

Present—Hon. Howard T. Hogan, Presiding Justice
" " David L. Glickman
" " Joseph F. Gagliardi, Justices

The People of the State of New York,
Respondent,

vs.

Robert Brown
Appellant

The above named Robert Brown, the defendant herein, appealed to this Court from a judgment of the District Court of the County of Suffolk, First District, Hauppauge rendered on the 8th day of March, 1974, after a trial convicting him of a violation of Section 235.05(1) Penal Law and imposing sentence as follows:

Fine $1000.00 and probation, three years. Special Conditions.

and said appeal having been argued by Joel Hirschhorn, Esq., of counsel for the appellant, and argued by Ronald E. Lipetz, Esq., of counsel for the respondent, and due deliberation having been had thereon;



It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

---

Cal. No. 80 — Judgment of Conviction affirmed.
No opinion. All concur.

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APPELLATE TERM SUPREME COURT
NINTH and TENTH JUDICIAL DISTRICTS
STATE OF NEW YORK

I, CHARLES J. HEANEY, Clerk of the Appellate Term of the Supreme Court, Ninth and Tenth Judicial Districts, do hereby certify that I have compared this copy with the original filed in my office on APR 25 1975 and that this copy is a correct transcript of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on APR 25 1975.

Charles J. Heaney
Clerk

Joseph F. Gagliardi
Justice, Appellate Term

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. LAWRENCE H. COOKE,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

Robert Brown,
Appellant.

CERTIFICATE OF DENYING LEAVE

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
July 7, 1975

/s/ Lawrence H. Cooke
Associate Judge

*Description of Order: Order of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, entered April 25, 1975, affirming a judgment of the District Court of the County of Suffolk, First District, Hauppauge, rendered March 8, 1974, convicting defendant of a violation of Section 235.05(1) of the Penal Law.



AMENDMENT I
CONSTITUTION OF THE UNITED STATES

FREEDOM OF RELIGION, SPEECH AND PRESS: PEACEFUL ASSEMBLAGE: PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV
CONSTITUTION OF THE UNITED STATES

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
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October Term, 1975

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No. 75-530

ROBERT BROWN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

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On Petition for Writ of Certiorari to the State of New York Court of Appeals and/or Supreme Court of the State of New York, Ninth and Tenth Judicial Districts

---

# BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

---

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Introduction ---------- | 1 |
| Opinions Below ---------- | 2 |
| Jurisdiction ---------- | 2 |
| Questions Presented ---------- | 3 |
| Statutes Involved ---------- | 3 |
| Constitutional Provisions Involved --- | 3,4 |
| Statement of Facts ---------- | 4-7 |
| Arguement | |
| Point One - The terms and conditions of Petitioner's Probation were not violative of his rights under the First and Fourteenth Amendments ---- | 7-10 |
| Point Two - The trial judge's instructions did not deprive Petitioner of his rights to due process under the Fourteenth Amendment --------- | 10-14 |
| Conclusion ---------- | 15 |

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Birzon v. King 469 F. 2d 1241 (2d Cir. 1972) | 9 |
| Boule v. City of Columbia 378 U.S. 347 (1964) | 14 |
| Burns v. United States, 287 U.S. 216 (1932) | 7,8,10 |
| Chapman v. California, 386 U.S. 18 (1967) | 11 |
| Hamling v. United States, ____ U.S. ____, 94 S. Ct., 2887 (1974) | 12 |
| Miller v. California, 413 U.S. 13 (1973) | 11,13,14 |
| People v. Heller, 33 N.Y.2d 314 (1974) | 11,14 |
| People v. Oskroba, 305 N.Y. 113 (1953) | 7 |
| People v. Santos, 31 A.D.2d 557 (First Dept. 1969) | 8 |
| People v. Ware, 29 A.D.2d 557 (Second Dept. 1967) | 8,10 |
| Porth v. Templar, 453 F. 2d 330 (10th Cir. 1971) | 9 |
| Roth v. United States, 354 U.S. 476 (1957) | 10 |
| Stanley v. Georgia, 394 U.S. 557 (1969) | 9 |

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---

# BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

---

## INTRODUCTION

This brief is submitted by Respondent in opposition to a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and/or the Appellate Term of the Supreme Court of

the State of New York, Ninth and Tenth Judicial Districts.

## OPINIONS BELOW

The opinions rendered by the State Courts have not been reported. However, the Order of the Appellate Term of the Supreme Court, dated April 25, 1975, affirming Petitioner's conviction for Obscenity and the Certificate of the Honorable Lawrence H. Cooke, dated July 7, 1975, denying Petitioner leave to appeal to the New York Court of Appeals are contained in the appendix to the Petition herein.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, Subdivision 3. Petitioner claims that he has been deprived of his First and Fourteenth Amendment rights under the United States Constitution.

## QUESTIONS PRESENTED

1. Do the terms and conditions of Petitioner's probation violate his rights under the First and Fourteenth Amendments?

2. Did the instructions of the Trial Court violate Petitioner's right to due process under the Fourteenth Amendment?

## STATUTE INVOLVED

New York Penal Law, Section 235.05, Subdivision 1 provides:

> "A person is guilty of Obscenity when, knowing its content and character, he:
>
> 1. Promotes, or possesses with intent to promote, any obscene material."

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States
Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF FACTS

On March 5, 1969, Detective Irene Felton of the Suffolk County,New York, Police Department was assigned to an undercover investigation of the Overstock Book Company (hereinafter referred to as Overstock) for possible violations of New York's Obscenity Statute (Penal Law, Section 235.05). Overstock is a large scale distributor of various

books and magazines with a warehouse located in Suffolk County, New York.

As part of her investigation, Detective Felton was able to obtain employment at Overstock as a receptionist and clerical worker. During the course of her employment, she had occasion to meet the Petitioner herein, Robert Brown, who was the President of Overstock. She was also able to familiarize herself with the general layout of the warehouse and the different types of publications that were being distributed.

Based upon her investigation, Detective Felton made application for the issuance of a search warrant. On April 17, 1969, a warrant was issued by the Honorable Pierre G. Lundberg of the County Court of Suffolk County and, pursuant thereto, certain books, magazines and slides were seized from the Warehouse which formed the basis of this criminal prosecution against Petitioner.

Petitioner's trial began on November 26, 1973 in the District Court of Suffolk County after numerous pre-trial motions and proceedings had been conducted. After trial, the jury convicted Petitioner of violating the provisions of Penal Law, Section 235.05, Subdivision 1 (promoting obscenity).

On March 7, 1974, Petitioner was fined in the amount of $1000.00 and sentenced to three year's probation by the Honorable Lawrence Newmark. As part of the terms and conditions of his probation, Petitioner was directed to:

> "... avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly."

On April 25, 1975, the Appellate Term of the Supreme Court for the Ninth and Tenth Judicial Districts unanimously affirmed Petitioner's conviction without opinion. Leave to appeal to the New York State Court of Appeals was denied

on July 7, 1975 by the Honorable Lawrence H. Cooke.

## POINT ONE

### THE TERMS AND CONDITIONS OF PETITIONER'S PROBATION DO NOT VIOLATE HIS RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

On March 7, 1974, Petitioner was fined in the amount of $1000.00 and sentenced to three year's probation. As part of the terms and conditions of his probation, he was directed to:

> "...avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly."

Probation is a privilege and not a right. It has been held to be a matter of grace. Burns v. United States, 287 U.S. 216 (1932); People v. Oskroba, 305 N.Y. 113 (1953). The enjoyment of the privilege is subject to compliance by the probationer with reasonable conditions. These

may include suitable conditions to achieve the purpose of probation; to wit: rehabilitation of the criminal and the protection of the public. People v. Santos, 31 A.D.2d 508 (First Department, 1969); aff'd 25 N.Y.2d 976;cert. den. 397 U.S. 969 .

Implicit in every grant of probation is the requirement that the probationer not commit another crime. People v. Ware, 29 A.D.2d 557 (Second Department, 1967). While on probation, he must "in all respects conduct himself as a law-abiding citizen." Burns v. United States, supra, at page 223.

Petitioner herein has been duly convicted in the State Court of promoting obscenity (Penal Law, Section 235.05, subdivision 1). He has been directed, as part of his probation, to refrain from selling, producing or promoting sexually explicit material. Said restriction is

reasonably related to the Court's legitimate interest in Petitioner's activities and, thus, does not violate his rights under the First Amendment. Birzon v. King, 469 F. 2d 1241, 1243 (2nd Cir. 1972); Porth v. Templar, 453 F. 2d 330, 334 (10th Cir. 1971). Indeed, where a defendant is placed on probation, the State retains a substantial interest in insuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal activity. Birzon v. King, supra.

Petitioner's argument that he could be in violation of the terms of his probation by having a sexually explicit magazine in his home is both untenable and unrealistic - especially when viewed in the light of the Court's decision in Stanley v. Georgia, 394 U.S. 557, 565 (1969). What is obviously prohibited by the terms of Petitioner's probation is his promotion of obscene material in violation of Section 235.05 of the New

York Penal Law. Such material has never been constitutionally protected. Roth v. United States, 354 U.S. 476 (1957). As we indicated above, implicit in every grant of probation is the requirement that the probationer not commit another crime. People v. Ware, supra; Burns v. United States, supra.

Accordingly, it cannot be said that the terms of petitioner's probation are so vague that "men of common intelligence must necessarily guess at its meaning."

## POINT TWO

### THE TRIAL JUDGE'S INSTRUCTIONS DID NOT DEPRIVE PETITIONER OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

In a comprehensive charge, the Trial Judge carefully discussed the evidence and the law. The jury was instructed that if there was a reasonable doubt that the Petitioner promoted obscenity, then he was entitled to an acquittal.

The jury was also charged that scienter could not be inferred merely from the fact that the material in question was contained in a warehouse where Petitioner worked. The trial judge further charged that the jury must acquit if they determined that the books in evidence were not identical to the ones Detective Felton observed and seized.

To assist the jury in arriving at a verdict, the trial judge proceeded to give examples of conduct declared to be obscene under state law. Since a "state standard" was to be applied in determining the issue of obscenity, the examples were properly given to the jury for its consideration. Miller v. California, 413 U.S. 13, 25 (1973); People v. Heller, 33 N.Y.2d 314, 322 (1974). If error was committed in this regard, and we submit there was no error, it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). As this

Court observed in Hamling v. United States,

____ U.S. ____, 94 S. Ct. 2887, 2901 (1974):

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of law."

The trial judge properly charged the jury on the definition of obscenity as set forth in Penal Law, Section 235.00, Subdivision 1. That section provided:

> "Any material or performance is 'obscene' if (a) considered as a whole, its predominate appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its desemination to be designed for children

> or other specially susceptible audience." 1

Petitioner now contends that he is entitled to the benefit of any change in the law wrought by the Court's decision in Miller v. California, supra, and that the trial judge should have charged the new obscenity test as enunciated therein. It should be observed, however, that Miller substantially changes the law of obscenity, and as a general proposition, now makes it easier to convict defendants charged with Obscenity. Indeed, the Court specifically recognized the virtual impossibility of proving that material is "utterly without redeeming social value" (413 U.S. at p. 22). The Court, instead, adopted a less stringent standard of proof, to wit: the

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1. This section was subsequently amended by the legislature to bring the law into conformity with Miller v. California, 413 U.S. 15 (1973).

the prosecution need only show that the "work, taken as a whole, lacks serious literary, artistic, political or scientific value" (413 U.S. at pp. 25, 37).

Therefore, to have prosecuted Petitioner under the judicially devised Miller definition of Obscenity and to have instructed the jury on it would have been the equivalent of an ex post facto application of the law. This the due process clause forbids. Boule v. City of Columbia, 378 U.S. 347 (1964); People v. Heller, 33 N.Y.2d 314, 330 (1974).

Therefore it cannot be said that Petitioner's right to due process was violated by the trial judge's instructions to the jury.

## CONCLUSION

THE PETITION FOR CERTIORARI
SHOULD BE DENIED

Respectfully submitted,

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